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IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1955.

No. 598.

Leona Holcomb, individually, Leona Holcomb, as guardian of the person and estate of Donald George Fleming, a minor; Donald George Fleming, a minor; Edward Denham, Frank T. Denham, George Denham, Clarence M. Denham and Mary Jane Hopkins, *Petitioners,*

vs.

Aetna Life Insurance Company, a corporation, *Respondent.*

REPLY BRIEF OF PETITIONERS FOR *CERTIORARI.*

The respondent, Aetna, devotes over 17 pages of its brief in opposition to certiorari to a recitation of alleged facts in a case in which no witness has ever been sworn or other evidence of any character offered.

Thereafter, on page 18 of its response, Aetna proceeds:

> "We then come to the order from which the appeal was taken to the Court of Appeals, which was entered on November 12, 1954."

Then follows a partial but materially incomplete portion of injunctive order. Respondent next devotes approximately two further pages of its brief to statements of matters wholly extraneous to the issues properly before this Court. In this manner Aetna seeks to obscure and evade the grounds upon which petitioners have been obliged to invoke the jurisdiction of this, The Supreme Court of the United States.

That portion of the injunctive order which Aetna does set forth in its brief discloses that:

1. The injunction complained of was issued,

"* * * on verbal application of the plaintiff, Aetna Life Insurance Company * * *."

2. That the injunction was permanent in form.

"It Is Ordered, Adjudged and Decreed that the defendants * * * be and they are hereby enjoined, and restrained * * *."

3. That the order specifically enjoined prosecution of cause 87402, in the District Court of Tulsa County.

"* * * this restraining order * * * enjoins and restrains the prosecution of * * * Cause 87402 in the District Court of Tulsa County, State of Oklahoma, entitled Mary Jane Hopkins, *et al., vs.* Aetna Life Insurance Company, *et al.*, * * *."

Error of the court "in restraining and enjoining defendants from proceeding in Cause No. 87402, in the District Court of Tulsa County, State of Oklahoma, entitled Mary Jane Hopkins, *et al., vs.* Aetna Life Insurance Company, *et al.*, is the specific basis of complaint set forth in the statement of points relied upon on appeal. (Tr., p. 1)

For convenience of the Court the Petition in Cause No. 87402, in the District Court of Tulsa County, Oklahoma, being Exhibit 5 to the Amendment to Complaint for Interpleader, is set forth in *haec verba* in the Appendix to Petion for Certiorari as Exhibit 11, pages 38 to 44-b. *Examination of this exhibit will disclose clearly that the cause of action therein set forth is neither directly or indirectly one for benefits under an annuity issued by Aetna Life Insur-*

ance Company, whether under policy AN 34409 or otherwise.

Cause No. 87402 is a suit for damages, actual and punitive, under the laws of the State of Oklahoma, in the total sum of $462,703.88. Petitioners, in substance, complains in that suit that on or about the 31st day of October, 1950, diverse persons, including an agent of Aetna, acting jointly, secretly entered the private safety deposit box of petitioners' testatrix; that they unlawfully took therefrom certain specific registered U. S. Bonds and by affixing an "X" thereon and fraudulently representing the same to be the signature of the registered owner (petitioners' testatrix), who was at the time to their knowledge wholly incapacitated and slowly dying, converted the proceeds of such bonds to defendants' own purposes.

Aetna's coldly calculated effort to divert attention from Case No. 87402 by what it categories "a chronological statement of the facts in this case" is followed by the demonstrably false statement on page 12, that:

> "Thereafter on April 15, 1954, in the District Court of Tulsa County in Case No. 87402 the same law suit was filed." (Tr. 72)

Aetna's object in discussing the alleged facts and proceedings in other cases with only the indirect and incorrect reference to cause No. 87402, quoted, indicates that to sustain an indefensible position, respondent not only supplies testimony in an action in which no evidence was offered or received, but shies completely away from an exhibit to its own amended but unverified complaint which shows clearly that Cause No. 87402 in no manner involved claims under any annuity insurance policy issued by Aetna which could properly give rise to an action in interpleader. The cause

of action set forth in the state court suit arose before the annuity on which Aetna premises the so-called interpleader suit was applied for.

Aetna's brief omits that portion of the injunction complained of which shows the date the injunction was actually entered November 22, 1954, rather than November 12.

Aetna's brief also omits that portion of the injunction which shows that at the time the U. S. District Judge from the bench, in the course of hearing unrelated matters, announced an intention to enter such an injunction, his attention was specifically invited to the fact that:

(*a*) No verified application for the injunction had been filed;

(*b*) No evidence had been offered;

(*c*) No notice had been given;

(*d*) No bond had been executed;

(*e*) The entry of such an injunction was expressly prohibited by federal law and the Rules of Civil Procedure.

POINT I.

Aetna endeavors to answer Point I wherein petitioners assert that the U. S. District Court erred in construing 28 U. S. C. A. 1335, 1397, and 2361, to authorize issuance of a permanent injunction on oral application, based on an unverified pleading and without notice or evidence, by a contention that:

> "The action that we have brought is an action in the nature of interpleader * * *." (Br. 23)

And cite authorities—

> "* * * in support of our position that interpleader is the proper action * * *." (Br. 25)

And to the rule that—

> "In an action for interpleader temporary injunction or restraining order may be granted." (Br. 26)

All of which is, of course, completely alien to any issue here. Aetna concludes this point by asserting that:

> "The preliminary injunction granted was in effect a temporary restraining order." (Br. 26)

Aetna ignores the record herein showing petitioners have been since the date of the injunction (Nov. 22, 1954) prevented from proceeding with the trial of a suit at law for tort in a state court of competent jurisdiction, and that, unless afforded relief in this Court they will continue indefinitely, if not permanently, enjoined from pursuing *the only remedy available to them in any court, state or federal.*

In the interim, *without either paying or offering to pay its obligations in either the state court suit or the federal court,* Aetna enjoys the unique advantage of standing by while witnesses disappear, evidence is lost or vanishes and defendants die. Aetna thus effectively aborts the judicial power and authority of the courts of the State of Oklahoma to proceed with the trial of a suit in which exclusive jurisdiction of the state court cannot be reasonably doubted.

Aetna at page 27 misquotes F. R. C. P., Rule 15 (c), in an effort to justify its failure to verify the Amendment to its Complaint. The rule reads:

> "Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading."

Aetna omits "to the date of" and asserts that rule to declare that "the amendment to the complaint relates back to the original complaint." (Br. 27) Which is exactly no answer to the proposition that the amendment, wherein alone Cause No. 87402 is so much as mentioned, is unverified. There is certainly nothing in Rule 15 (c) to indicate that a *verification* relates *forward* to cover new and different allegations in a subsequent pleading.

Aetna ignores the fact that the injunction itself cites that it was issued "on verbal application" and *not on the basis of either the original complaint or the amendment thereto.*

Aetna further declares under this head:

> "The complaint shows that irreparable injury that plaintiff would sustain if it was not granted * * *." (Br. 27)

Obviously this statement is merely gurgling. It's hard to conceive how Aetna under the most favorable statement of the case could suffer irreparable damage by the trial in the state court. For if Aetna is innocent of the wrong complained of in the State Court, it could not be irreparably damaged by the opportunity afforded to establish its innocence.

On the contrary, if Aetna did in truth and fact surreptitiously loot the private bank safety deposit box of plaintiffs' testatrix, as alleged, one would ordinarily suppose a *federal court of equity* one of the last places where it would find refuge from the consequences of its wrong.

POINT II.

Aetna's argument under Point II indicates clearly that its contention in the U. S. District Court (which was sustained in the Tenth Circuit) is that *in actions in the nature of interpleader injunctions may be issued without notice to the adverse party.* This conflict in the decisions between the Tenth and other circuits is one of the grounds relied upon herein for certiorari.

POINT III.

Under this head Aetna argues in effect that no bond was required to support the injunction entered Nov. 22, 1954, which is the only injunction ever entered enjoining the prosecution of Cause No. 87402 in the state court. Herein again Aetna in effect points up the wide variance between the decisions of the Tenth Circuit and those of other circuits and of the federal law itself. See Title 28, U. S. C., Sec. 1335.

On what theory damages for wrongfully procuring a subsequent injunction could be imposed on a surety under an indemnity bond and made to "relate back" for some months is not made apparent. No authorities to sustain such a proposition are cited. That such a departure in the usual rules has been sanctioned in the Tenth Circuit further emphasizes the claim to certiorari.

POINT IV.

Under this head Aetna merely interposes an argument based upon alleged facts in an action where no evidence was offered and the injunction was entered on "verbal applicatio." No authorities are cited. The record thus indicates

Aetna's claim, first sustained in the opinion herein in the Tenth Circuit, that if in the federal court the action is merely declared to be one in interpleader, the federal court may summarily enjoin any suit of any kind in any court. That such is in substance the holding herein in the Tenth Circuit demonstrates that certiorari is warranted.

POINT V.

Under Point V Aetna argues that under Rule 19 of this Court certiorari is not warranted. Yet without certiorari petitioners find themselves confronted with a situation wherein they have been, and presumably will continue to be, summarily cut off *from any remedy in either state or federal court* for the wrongs complained of in their petition filed in the State Court in Tulsa County, Oklahoma. The cause of action set forth in their petition in the state court is not one over which the federal court can, in any manner, acquire jurisdiction in an action in the nature of interpleader or otherwise. The case is one that is non-removable. It is a suit within the exclusive jurisdicton of the state court, and *is an entirely different cause of action from any which could arise under Aetna's annuity.*

That a United States District Court should attempt to make a federal court of equity an asylum for wrong-doers who seek refuge from valid claims against them in suits at law in a state court of competent jurisdiction, such as that at bar, where it is clear that under no theory could the federal court acquire jurisdiction to determine the issues tendered in the state court proceeding, and that by this method persons asserting in good faith in the state court a cause of action such as that set forth in the petition in Case No. 87402 may be deprived of a remedy—even the

right to be heard on any issue of either fact or law in the United States District Court is a further circumstance making certiorari in the instant case an urgent and compelling method of obtaining relief, for petitioners have exhausted every other.

Wherefore petitioners renew their prayer that the writ be granted.

Respectfully submitted,

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